



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
MILIMANI LAW COURTS
SUCCESSION CAUSE 554 OF 2011

IN THE MATTER OF THE ESTATE OF STEPHEN GITHIRI BABU (DECEASED)

JANE NYOKABI GITHIRI.....PETITIONER/RESPONDENT

VERSUS

SUSAN MUTHONI KANJA.....OBJECTOR/APPLICANT

R U L I N G

1. The Summons dated 30th May 2011 is premised on the provisions of **Section 47** of the **Law of Succession Act, Cap 160** and **Rules 59** and **73** of the **Probate and Administration Rules** as read together with **Section 7** of the **Interpretation and General Provisions Act, Cap 2**. The specific Prayers sought are;

“1) The Application be heard ex-parte at the first instance and accordingly be certified as Urgent.

2) The honourable Court be pleased to stay the orders given on the 9th day of May 2011 and any consequential orders pending the hearing and determination of this Application inter partes.

3) All the income receivable into the deceased’s estate herein, in particular the rental income in respect of the leased property; being title No.Muguga/Muguga/97, be paid into the deceased’s Bank Account no.0570194421375 at Equity Bank Limited at Kikuyu Branch subject to supervision of the petitioner (Jane Nyokabi Githiri) and the Objector/Applicant (Susan Muthoni Kanja) by way of bank deposit slips from the tenants until further orders of the Court.

4) The staus quo regarding the tenancies in the property; being Title No.Muguga/Muguga/97 and the terms of the occupation thereof by the respective tenants be maintained pending further orders of the Court.

5) That there be no drawings from the said Bank Account No.0570194421375 at Equity Bank Limited at Kikuyu Branch subject to the orders of this honourable Court.

6) The honourable Court be pleased to set aside the orders given on the 9th day of May 2011 and any consequential orders.

7) The consequent of granting of the Prayer No.6 above, the Objector/Applicant be granted leave to file and serve upon the Petitioner her Replying Affidavit and accordingly oppose the Petitioner's Application dated 8th day of March 2011 at an inter partes hearing.

8) An order be issued to preserve the assets of the deceased estate as listed in the Affidavit of Susan Muthoni Kanja sworn in support of the Application herein ad prohibit any dealings therewith in the nature of sales, transfers and/or charging pending further orders of the Court.

9) The costs of the Application be provided for."

2. In the Affidavit sworn on 30th May 2011 it is the Applicant's case that the Respondent filed an Application dated 8th March 2011 seeking orders that she be restrained from inter-alia collecting rent from the rental houses situated on land parcel No.Muguga/Muguga/97 and that the Respondent be declared as lawfully entitled to receive the said rents.

3. That although the said Application was dropped in her office on 5th May 2011 (*in her absence*), she nonetheless instructed her lawyer to appear for inter-partes hearing on 9th March 2011 but on that day together with her lawyer, they appeared in Court but the matter was not listed. On making enquiries at the Family Division Registry, she was informed that the file could not be traced and that is why it was not listed. Annexure "SMK 1" is the Cause List for that day and her position is that the matter was not listed at all.

4. In any event, she adds that she was very shocked when after weeks of futile efforts by her lawyers to have the file availed, on 20th May 2011, a tenant on land parcel No.977 aforesaid informed her that the Respondent's Lawyers had written to the tenants and informed them of certain orders issued by the Court on and when her lawyer went to the Court Registry on 23rd May 2011, the file was availed and he noted that the record read as follow;

"21/3/2011 ----- Before Maraga J.

Kisa for the Petitioner

Court

Certificate of Urgency granted

Application to be heard inter partes on 9/5/2011

----- 9/5/2011 ----- Before Maraga J.

Kisa for the Petitioner

***Mr. Kisa
that the same be allowed.***

We have served the Application but the same is not opposed. I pray

***Court
hereby granted as prayed."***

As application dated 8th march 2011 is not opposed, the same is

5. The Applicant's complaint is that the above Orders were issued in her absence and when the matter was not listed and so she is entitled to setting aside thereof and to be heard on the issues raised in the Application dated 8th March 2011.

6. I should pause here and state that the issues raised at paragraphs 27 - 44 of the Applicant's Affidavit are best left as they are and I will state why, later on.

7. On whether the ex-parte order ought to be set aside, the Respondent filed a Replying Affidavit on 21st June 2011 and in it, she deponed as follows;

8. That the Application dated 8th March 2011 was served on the Applicant through her secretary on 7th April 2011 but the Applicant did not respond to it and that although the matter was not listed on 9th May 2011, the Applicant was nowhere to be seen and so the Respondent's Advocate went to the Registry and had the file placed before Maraga J. who gave the ex-parte orders.

9. Further, that the ***“errors and inadvertences on the part of the Family Division Registry officials should not be visited”*** upon her and her children.

10. At paragraphs 17-41 of her Replying Affidavit, the Respondent has gone to great details to show why she is convinced that the Applicant was never lawfully married to the deceased and why therefore the estate should be left to the exclusive use of the Respondent and her children.

11. On my part and at this stage, the only issue I wish to address is that of the Application dated 8th March 2011 and whether the Orders issued by Maraga J. on 9th May 2011 should be set aside.

12. It is admitted by the Respondent that on the latter date, the Application was not listed as is also the contention by the Applicant. **If that be so, how did the file find its way to the learned judge?** The Respondent, at paragraphs 9 and 10 of her Affidavit deponed as follows;

“9) That although the matter did not appear on the Cause List of 9th May 2011, nevertheless my Advocate, Patricia Khisa made attempts to locate the file and enquired both from the family Law Registry and from the Executive Officer, Family Division as to the reasons why the matter was not listed and yet the date had been given in Chambers by the honourable Judge and the Applicant was in Court as required.

10) That my Advocate Patricia Khisa was informed by the Deputy Registrar that failure to have the matter listed in the Cause List of 9th May 2011 was an inadvertence on the part of the Registry officials but the file would be placed before the honourable Justice Maraga because the date had been given in Chambers by the honourable Justice himself.”

13. As I understand the Respondent, no attempt was made by both herself and her lawyer to ensure that the Applicant was also present when the file was taken before the learned judge. Once that is the position, then an injustice was committed. I believe the argument by the Applicant that once the matter was not listed in the daily Cause List, the correct procedure would have been for the Respondent to take another date and serve the Applicant so that each of them would have the chance to appear before a Judge and argue their respective cases sought. Once that was not done, then the Orders sought by the Applicant must be granted ex debito justitiae

14. Both parties have gone to great lengths to state why either the Applicant is entitled to the estate or is disentitled to it. Applying my mind to those issues, I am certain that they are not for me to deal with at this stage but they should be dealt with when the Application dated 8th March 2011 is argued inter-partes.

15. The above being my findings, it follows that the Application dated 30th May 2011 is allowed and the final Orders to be made are;

“i) All the income receivable into the deceased's estate herein, in particular the rental income in respect of the leased property; being title No.Muguga/Muguga/97, be paid into the deceased's Bank Account no.0570194421375 at Equity Bank Limited at Kikuyu Branch subject to supervision of the petitioner (Jane Nyokabi Githiri) and the Objector/Applicant (Susan Muthoni Kanja) by way of bank deposit slips from the tenants until further orders of the Court.

ii) The staus quo regarding the tenancies in the property; being Title No.Muguga/Muguga/97 and the

terms of the occupation thereof by the respective tenants be maintained pending further orders of the Court.

iii) That there be no drawings from the said Bank Account No.0570194421375 at Equity Bank Limited at Kikuyu Branch subject to the orders of this honourable Court.

iv) The orders given on the 9th day of May 2011 and any consequential orders are hereby set aside.

v) The Objector/Applicant is granted leave to file and serve upon the Petitioner her Replying Affidavit and accordingly oppose the Petitioner's Application dated 8th day of March 2011 at an inter partes hearing.

vi) An order be issued to preserve the assets of the deceased estate as listed in the Affidavit of Susan Muthoni Kanja sworn in support of the Application herein and prohibit any dealings therewith in the nature of sales, transfers and/or charging pending further orders of the Court.

vii) Each party should bear its owns costs as the events of 9th May 2012 were not of their own making.”

15. Parties may now proceed to take directions on how and when the Application dated 8th March 2011 should be determined.

16. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 27TH DAY OF JANUARY, 2012.

27/1/2012

CORAM:

I. LENAOLA – JUDGE

Court Clerk – Miron

Mr. Ochieng for Objector

Miss Khisa for Petitioner

ORDER

Ruling duly read.

ISAAC LENAOLA

JUDGE

FURTHER ORDER

Mention on 10th February 2012 before G.B.M. Kariuki for directions.

ISAAC LENAOLA - JUDGE

27/1/2011